SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 19201

RONALD F. GILL, JR.

V.

BRESCOME BARTON, INC., ET AL.

BRIEF OF DEFENDANT-APPELLEE

BRESCOME BARTON, INC.
AND
CHUBB & SON

TO BE ARGUED BY:
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"Did the Appellate Court correctly conclude that the workers' compensation review board properly determined that the appellant (Liberty Mutual Insurance Group) was required to reimburse the Appellee (Chubb & Son) 50 percent of the temporary total disability payments paid to the claimant following his knee replacement surgery?"

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This appeal concerns two workers' compensation insurance carriers, Liberty Mutual Insurance Group (Appellant, hereinafter "Liberty Mutual") and Chubb & Son (Appellee, hereinafter "Chubb") that insured Brescome Barton, Inc. (hereinafter "employer") for separate periods of coverage. This case arises from Ronald Gill, Jr.'s (hereinafter "plaintiff") workers' compensation claim for bilateral knee replacement surgeries which were the result of two separate and distinct work-related injuries incurred by the plaintiff during his employment with the employer. The plaintiff sustained an injury to his left knee on July 2, 1997 while Liberty Mutual insured the employer. [Rev. F&A ¶ 1; A22.] The plaintiff subsequently injured his right knee on April 3, 2002 while the employer was insured by Chubb. [Rev. F&A ¶ 3; A22.] The plaintiff ultimately required bilateral knee replacement surgeries and elected to have both surgeries performed simultaneously. The medical necessity or reasonableness of the bilateral total knee replacement surgeries never was disputed by either Liberty Mutual or Chubb. [Formal Hearing Transcript, 1/10/2011 p. 2; A 26.]

On March 10, 2010, the parties appeared at a Formal Hearing held before Commissioner Ernie R. Walker. At that hearing, they entered into a writing which memorialized an agreement (hereinafter "2010 Agreement") by and between the parties that Chubb would authorize and administer the bilateral total knee replacements and Liberty Mutual would reimburse Chubb 50 percent of the surgical costs, including incidental expenses related to surgery and prescription medications. [2010 Agreement; A32.] The 2010 Agreement was executed by the plaintiff, counsel for Chubb and Liberty Mutual, as well as Commissioner Walker. [2010 Agreement; A32.] Liberty Mutual has failed to follow through with the terms of the 2010 Agreement as it has not reimbursed Chubb their 50 percent share of the medical bills relating to the plaintiff's knee replacement surgeries.

On January 10, 2011, the parties participated in a Formal Hearing on the issue of what amount, if any, Liberty Mutual would have to pay for indemnity benefits paid to the plaintiff following surgery. [1/10/11 Formal Tx., p. 5; A29.] At that hearing, Chubb represented that as the plaintiff's surgeries were the result of separate and distinct injuries and that each one of the surgeries would in and of itself render the plaintiff temporarily totally disabled, the temporary total disability benefits payable to the plaintiff during the recuperative period should be paid 50 percent by Chubb and 50 percent by Liberty Mutual. [1/10/11 Formal Tx., p. 3-4; A27-28.]

With respect to the calculation of the applicable rate, Chubb asserted that the relapse and recovery rate as set forth in General Statutes § 31-307b would govern. [1/10/11 Formal Tx., p. 4; A28.] Chubb calculated the relapse rate to be $692.75 per week. [1/10/11 Formal Tx., p. 4; A28.] Counsel for Chubb further advocated that if the Commissioner found that the relapse rate was not applicable and he reverted to the prior temporary total disability rate, Chubb would seek 50 percent of the indemnity rate chosen by the Commissioner. [1/10/11 Formal Tx., p. 4; A28.] At this hearing, counsel for Liberty Mutual stated that it previously had offered reimbursement to Chubb at a rate of $181.36, 37 percent of Chubb's base rate, which was rejected. [1/10/11 Formal Tx., p. 5; A29.]

At the hearing, counsel for Chubb assured the plaintiff that he would be paid: "[Y]ou will get whatever number the Commissioner so chooses, and then I will maintain my legal arguments as to Liberty Mutual in the future, so you are not left high and dry." [1/10/11 Formal Tx., p. 7; A31.] The plaintiff accepted Chubb's offer to compensate him on a without prejudice basis at the § 31-307b relapse rate of $692.75 for his period of disability following

the surgeries. The plaintiff subsequently underwent bilateral knee replacement surgeries performed simultaneously on February 24, 2011. [1/10/11 Formal Tx., p. 2; A26.]

On May 19, 2011, the Workers' Compensation Commissioner issued a Finding and Award, and subsequently issued a Corrected Finding and Award dated June 7, 2011, wherein he found that Liberty Mutual was responsible for 50 percent of the total disability benefits following the plaintiff's bilateral knee replacement surgeries at the relapse rate of $692.75. [Rev. F&A Conclusion G; A24.] Specifically, the Trial Commissioner found:

> This is a unique situation where neither knee injury affects the other injury. The combination of the two surgeries does not result in the Claimant being totally disabled- either knee replacement would totally disable the Claimant following surgery. The two injuries are separate and distinct injuries that do not in concert totally disable the Claimant. Instead, they are concurrent to each other. The decision to undergo both knee replacements simultaneously benefits the Claimant in that he has only one period of recovery and also benefits both insurance carriers in that they are able to split many of the surgical and post-surgical costs that would be duplicated had the Claimant opted for two separate surgeries.

[Rev. F&A ¶ 7; A23-24.] As a result, Liberty Mutual was to reimburse Chubb 50 percent of these benefits, as it previously was agreed that Chubb would administer the claim. [Rev. F&A Conclusion G; A24.] Liberty Mutual subsequently appealed to the Compensation Review Board (hereinafter "CRB"). [CRB Opinion; A12.]

On appeal, the CRB upheld the factual findings and decision of the Trial Commissioner. [CRB Opinion; A13.] The CRB concluded that the fact pattern in this matter was *sui generis* and that the Trial Commissioner properly exercised his powers pursuant to General Statutes § 31-278 in equitably resolving the dispute. [CRB Opinion; A13.] The CRB concluded that the apportionment statutes and case law were not applicable to the present case. As a result, the CRB opined that it was required "to look at the expressed intent of the

parties and the statutory approach to compensating total disability in the absence of multiple liable parties." [CRB Opinion; A17].

Liberty Mutual appealed the CRB's decision to the Appellate Court. On April 30, 2013, the Appellate Court affirmed the decision of the CRB. Gill v. Brescome Barton, Inc., 142 Conn App. 279 (2013). The Appellate Court held that the facts of this case are *sui generis* and there was not any applicable precedent which would preclude Chubb from receiving 50 percent of the indemnity paid to the plaintiff following surgery from Liberty Mutual. Id., 292. The Appellate Court also found the CRB adhered to the applicable standard of review and properly affirmed the Commissioner's Finding and Award. Id. The Court held, without actually deciding that an error occurred, that any error made by the CRB was harmless. Id. It concluded that the facts found by the CRB were gratuitous and unnecessary to the resolution of the legal issue before them. Id. The Court further held that the CRB's decision was supported by competent evidence as well as the Commissioner's powers pursuant to § 31-278. Id., 298. The Court acknowledged that the Trial Commissioner did not order the parties to apportion a percentage for a single injury or combination of injuries, but rather directed the insurers to pay 50 percent of the plaintiff's post-surgical disability, which he elected to incur by having simultaneous surgeries. Id., 299. The Court ultimately concluded that it agreed with the reasoning of the Trial Commissioner and the CRB that the remedial purposes of the Act were fostered by the plaintiff's undergoing bilateral knee replacement surgeries as the plaintiff only had to endure one period of recovery and it would not be reasonable for the plaintiff to undergo two separate surgeries. Id., 299-300.

Liberty Mutual subsequently filed a Motion for Reconsideration En Banc, which the Appellate Court denied. Liberty Mutual then filed a Petition for Certification to the Supreme

Court. On September 25, 2013, the Supreme Court granted certification limited to the following issue:

> Did the Appellate Court correctly conclude that the workers' compensation review board properly determined that the appellant (Liberty Mutual Insurance Group) was required to reimburse the Appellee (Chubb & Son) 50 percent of the temporary total disability payments paid to the claimant following his knee replacement surgery?

V. ARGUMENT

I. Standard of Review

The well established standard of review in workers' compensation appeals is as follows:

> The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them . . .It is well established that [a]though not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny." (internal quotation marks omitted.) Deschenes v. Transco, Inc., 288 Conn. 303, 311 (2008); Coppola v. Logistec Connecticut, Inc., 283 Conn. 1, 5-6 (2007); Tracy v. Scherwitzky Glutter Co., 279 Conn. 265, 272 (2006) ("[n]either the. . . board nor this court has the power to retry facts" [internal quotation marks omitted]); Gartrell v. Dept. of Correction, 259 Conn. 29, 36 (2002) ("[t]he commissioner has the power and duty, as the trier of fact, to determine the facts.)"

(Internal quotation marks omitted.) Marandino v. Prometheus Pharmacy, 294 Conn. 564, 572 (2010).

In this appeal, the Court's standard of review is plenary. The facts found by the Trial Commissioner must stand as they are not in dispute. However, this case is a case of first impression and therefore, it is afforded plenary review.

II. The Appellate Court correctly upheld the decision of the CRB which affirmed the Trial Commissioner's Finding and Award.

As this is a case of first impression with no directly applicable case law, it is helpful to start where the parties, Liberty Mutual and Chubb, agree. The parties agree that the plaintiff's

need for bilateral knee replacement surgery is reasonable and necessary. The parties agree that for medical sanity, the plaintiff's bilateral knee replacement surgeries should be performed simultaneously. The parties agree that Liberty Mutual has responsibility for the left knee and Chubb has responsibility for the right knee. The parties agree that if the plaintiff never suffered a second knee injury, Liberty Mutual would be solely responsible for the medical and indemnity payments with respect to the plaintiff's left knee replacement surgery. The parties agree that the medical and surgical costs for the plaintiff's surgeries should be split fifty-fifty between Liberty Mutual and Chubb. The parties agree that the Commissioner found that § 31-307b, also known as the "relapse statute," applied to the plaintiff's period of post-surgical indemnity. The parties agree that the plaintiff is not entitled to a double recovery of post-surgical indemnity benefits. The only issue on which the parties disagree is whether or not the post-surgical indemnity benefits should be split fifty-fifty between the insurance carriers in the same manner as the cost of the surgeries, the very cause of the plaintiff's disability, agreed to be paid.

The answer to this question lies in the one-hundred year history of the Workers' Compensation Act and is corroborated by common sense and fairness. In fact, the answer transcends biblical times with the Judgment of Solomon and the proverbial "splitting the baby" as a guideline. These guiding principles lead to one inescapable conclusion; the plaintiff's post-surgical indemnity benefits must be split equitably fifty-fifty between Liberty Mutual and Chubb.

The Trial Commissioner, CRB and our Appellate Court have all reached this precise and well-reasoned conclusion. At the trial level, and at each level of review, the opinions relied on the same common threads to weave the basis of their respective decisions: the

humanitarian and remedial purpose of the Workers' Compensation Act, equity, common sense, fairness and the prohibition against double recoveries. These themes go hand in hand with the Workers' Compensation Commissioner's powers to decide cases in furtherance of these goals.

It is well settled that the remedial purpose of the Act applies to claimants, however, as the CRB has so appropriately held, "Protecting the employee's rights does not mean ignoring the rights of the employer or insurer. Fairness and equity are two-way streets .. . ." Secola v. State of Connecticut Comptroller's Office, 3102 CRB-5-95-6 (February 26, 1997). No truer words have ever been written as it pertains to this matter. Here, the plaintiff sought the assistance of the Commissioner to pursue having his bilateral knee-replacement surgeries performed at the same time in an effort to shorten his recovery. While the insurers were able to come to an agreement with respect to the payment of the medical benefits, they proceeded with a Formal Hearing on the issue of the payment of the plaintiff's post-surgical indemnity. At that hearing, counsel for Chubb informed the plaintiff, on the record, that Chubb would pay him the applicable weekly indemnity payments following his surgery as decided by the Commissioner, "then I will maintain my legal arguments as to Liberty in the future, so you are not left high and dry." [1/10/11 Formal Tx., p. 7; A30]. It is clear that the plaintiff's rights were protected. Now it is Chubb who is left "high and dry."

It appears as if Liberty Mutual has forgotten, "[t]he spirit and purpose of the act, which is remedial in nature and should be construed broadly to accomplish its humanitarian purpose . . . " Leonetti v. MacDermid, Inc., 310 Conn. 195, 208 (2013), citing Szudora v. Fairfield, 214 Conn. 552, 557 (1990). Instead, it has adopted an overly narrow view and has considered portions of the CRB and Appellate Court's decisions in a vacuum without

consideration for the totality of their opinions. Alternatively, when the holdings in the underlying matter are viewed in their totality and with the remedial purpose in mind, it becomes clear that this situation is precisely the reason for the enactment of the Workers' Compensation Act and the purpose of the Workers' Compensation Commissioner.

A. The Appellate Court correctly upheld the determination of the CRB and Trial Commissioner that Connecticut case law is devoid of legal precedent which would preclude an equitable division of the indemnity benefits between Chubb and Liberty Mutual.

The Appellate Court, CRB and Trial Commissioner have all properly held that the facts of the present matter are *sui generis* and are not directly controlled by precedent. The undeniable fact that serves to differentiate this case from all other precedent is clear; each injury is independent of the other in rendering the plaintiff disabled. It is not the case that the plaintiff's injuries combined to render him disabled and there is absolutely no evidence to suggest that this is even a remote possibility. Accordingly, all of the reviewing bodies have correctly upheld the Trial Commissioner's determination that the plaintiff's post-surgical indemnity should be shared equally between Chubb and Liberty Mutual as this decision is rooted in common sense, fairness and is consistent with the totality of the Act.

Connecticut's decisions regarding apportionment from 1937 through the landmark decision in Hatt v. Burlington Coat Factory, 263 Conn. 279 (2003), and beyond, *all* have one thing in common; the plaintiff's disability *was caused by a combination of injuries.* An analysis of the cases cited by the parties throughout this matter is helpful to depict the true inapplicability of prior case law. The Appellate Court performed this analysis and affirmed the CRB's determination that all cases were factually distinguishable and thus, none applied. Gill v. Brescome Barton, Inc., supra, 142 Conn App. 291 n.9.

In Mages v. Alfred Brown, Inc., 123 Conn. 188, 190 (1937), the plaintiff suffered a compensable back injury while working for one employer in 1935. In 1936, the plaintiff then suffered a second compensable back and left shoulder injury while working for a different employer. Id., 189-90. The Commissioner found that both injuries were *substantial causes* of the plaintiff's disability and entered an award against both employers. Id., 191. On appeal, the court reversed and found the second employer responsible for payment of the claimant's full compensation for his final disability and did not find apportionment proper. Id., 195.

The Supreme Court had occasion to revisit Mages in Mund v. Farmers' Cooperative, Inc., 139 Conn. 338 (1952). In Mund, the plaintiff suffered a ruptured disc in 1946 and ultimately returned to work in 1950. Id., 340-41. The plaintiff subsequently suffered a second injury consisting of a reopening of the ruptured disc. Id. The employer had a different insurance carrier at the time of the plaintiff's second injury. Id., 340. The Commissioner found that the two accidents were, *"equal, concurrent and contributing causes"* of the plaintiff's resulting disability and ordered both insurers to pay compensation. (Emphasis added.) Id., 341. On appeal, the Supreme Court affirmed and distinguished the holding in Mages, supra. Specifically, the Court distinguished the cases on factual grounds and noted that in Mages, the second injury did not occur at the same location and there was no showing of a connection between the two injuries. Id., 344. The Court held that "common sense and fairness" supported the commissioner's finding of apportionment of liability between the two carriers. Id., 345.

Liberty Mutual has relied heavily on Hatt for the proposition that apportionment is not allowed pursuant to General Statutes § 31-299b. However, Liberty Mutual has taken the Appellate Court's characterization of the fact pattern of Hatt as outlined in Marroquin v. F.

Monarca Masonry, 121 Conn. App. 400 (2010) out of context resulting in a misstatement of the facts and a flawed analysis.[1] What Liberty Mutual has omitted from its analysis is the same crucial fact as in Mages and Mund: the injuries combined to render the plaintiff disabled. This is readily apparent when the facts of the actual case are examined rather than an out of context partial recitation.

In Hatt, supra, 263 Conn. 279, the Court held that when two injuries *combine* to disable an individual, the last party on the risk is solely responsible for compensating the individual for her injury with the exception of permanent partial disability benefits attributable to the first injury.[2] The plaintiff in Hatt suffered a compensable injury to her left ankle and foot during the course of her employment with the respondent employer in 1988. Id, 284. She was diagnosed with a severe muscle and ligament strain of her left foot and assigned a 10 percent disability rating. Id. The employer's workers' compensation carrier, Fireman's Fund, issued a voluntary agreement for the injury and paid benefits to the claimant. Id.

The plaintiff continued to work at the same position into the 1990s despite continuing pain. Id. In 1995, her treating physician increased the rating of her left foot to 25 percent.

1Marroquin v. Monarca Masonry, 121 Conn. App. 400 (2010), is also factually distinguishable from the present case as well as Hatt, supra as it involves a single injury. In Marroquin, the claimant sustained a hernia injury and underwent a surgical repair with mesh in 2001. Id., 403. The claimant subsequently experienced groin pain in 2004 and was diagnosed with diverticulitis and a possible hernia. Id., 404. The Commissioner determined that the claimant had not sustained a new injury in 2004. Id. Rather, the mesh from the claimant's first surgery had caused his injury. Id. As a result, the carrier for the 2004 injury had requested reimbursement for expenses and benefits paid arising from the 2004 injury and subsequent surgery. Id., 406. The Appellate Court affirmed the decision of the CRB and Commissioner to reimburse the second carrier for benefits paid on the claimant's behalf. Id.

2 It appears that Liberty Mutual also has cited Fimiani v. Star Gallo Distributors, Inc., 248 Conn. 635 (1999), for the proposition that the Second Injury Fund should accept liability for all disability benefits due to the plaintiff. However, again, that case is factually distinguishable as the plaintiff's injuries *combined* to render him totally disabled.

Id., 284-85. In August 1998, the plaintiff filed a second claim, citing a May, 1998 date of injury as well as her continued work since 1988 as causal factors. Id., 285-86. Shortly thereafter, Atlantic Mutual, which now insured the employer's liability, filed a notice to contest liability. Id., 286. Following a hearing on the matter, the trial commissioner determined that the condition of the plaintiff's left foot in 1998 was the result of a cumulative work-related injury following the initial 1988 injury. Id. The commissioner ordered that the plaintiff's post-1998 disability and medical expenses be apportioned pursuant to § 31-299b between Fireman's Fund and Atlantic Mutual, with the latter serving as lead carrier. Id., 286-87.

On appeal, the CRB reversed, holding that Atlantic Mutual solely was liable. Id., 287. The CRB concluded that the plaintiff had suffered two separate and distinct injuries to her left foot: the 1988 injury and a second injury due to years of repetitive trauma. Id. It held that apportionment was inappropriate under § 31-299b, because that statute allowed apportionment only in instances of single injuries of repetitive trauma or occupational disease. Id. Atlantic Mutual thereafter sought review by the Supreme Court. Id., 288. The Supreme Court affirmed the decision of the CRB. Id., 317. The Court disagreed with Atlantic Mutual's arguments that apportionment was available under either General Statutes §§ 31-349 or 31-299b. Id., 289.

In the present case, there is only one common denominator between the plaintiff's knee injuries: time. The plaintiff chose to undergo both knee replacement surgeries at the same time. Liberty Mutual has asserted that the plaintiff's injuries became inextricably combined by virtue of the simultaneous knee surgeries. This simply is not true. Indeed, the Appellate Court aptly stated: "Here, the commissioner found that the plaintiff's knee injuries

were separate and concurrent, not cumulative. Liberty Mutual has not disputed that finding."[3] Gill v. Brescome Barton, Inc., supra, 142 Conn. App. 292. The Appellate Court, CRB and Trial Commissioner all properly held that each total knee replacement surgery, in and of itself, was sufficient to render the plaintiff totally disabled. This decision was based on the medical evidence,[4] the facts found by the Commissioner and applicable case law. The Appellate Court appropriately acknowledged this distinction:

> Although the commissioner ordered each insurer to pay 50 percent of the indemnity owed to the plaintiff, he did not order the parties to apportion a percentage of the indemnity for a *single injury or combination of injuries.* The commissioner directed the insurers to pay 50 percent of the plaintiff's indemnity for a period of disability he elected to incur by having the separate first and second injuries treated by means of simultaneous bilateral knee replacement surgeries. Liberty Mutual acknowledges it is responsible for the plaintiff's first injury at a time other than when the second injury knee replacement took place.

(Emphasis added.) Gill v. Brescome Barton, Inc., supra, 124 Conn. App. 299-300.

The actions of Liberty Mutual in agreeing to accept 50 percent of the medical and surgical costs for two separate body parts, injured at different times, renders its argument that Chubb should pay 100 hundred percent of the indemnity caused by those surgeries not only logically inconsistent, but legally inconsistent. Liberty Mutual has relied on Hatt for the proposition that Chubb, as the carrier for the plaintiff's second injury, should pay all of the plaintiff's post-surgical indemnity payments. Ignoring for a moment the stark reality that Hatt

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3 It is well settled that . . ."Whe[n] an issue is merely mentioned, but not briefed beyond a mere assertion of the claim, it is deemed to have been waived..." Electrical Contractors, Inc., et al, v. Department of Education, 303 Conn. 402, 444 (2012).

4 Here, as the Compensation Review Board noted, "[i]n the absence of any probative medical evidence cited in the record, it would be conjecture to determine that the two knee injuries in this case are somehow interdependent as to causation for the claimant's disability." [CRB Opinion; A19, n.1; citing DiNuzzo v. Dan Perkins Chevrolet Geo, Inc., 294 Conn. 132 (2009).] Additionally, the Appellate Court correctly cited Costello v. Seamless Rubber Co., 99 Conn. 545, 549 (1923) for the proposition that "injuries involving the loss of member ordinarily involve a period of incapacity." Gill, supra, 142 Conn. App. 298.

does not apply to the facts of the underlying matter, which is fully supported by the findings of the Trial Commissioner, CRB and Appellate Court, if one were to hold true the Hatt rationale, Liberty's logic is fatally flawed. If the analysis in Hatt is applied to the facts in the present case, it would render Chubb, responsible for one hundred percent of the *surgical costs* as well as any post-surgical indemnity. In other words, Chubb would be responsible for the plaintiff's right knee surgery as well as Liberty's left knee. As Liberty Mutual already has agreed to pay for 50 percent of the surgical costs, it is logically inconsistent to argue that it is not responsible for *any* indemnity payments arising out a surgery for which it previously had agreed to pay half the liability.

The Appellate Court and CRB have zeroed in keenly on this incongruity. The Appellate Court responded to Liberty Mutual's argument that because the plaintiff's concurrent surgeries will render him disabled for a period of time, Chubb, as the insurer for the second injury, is liable for all of the indemnity payments pursuant to Hatt. Specifically, the Appellate Court held: "By agreeing to pay 50 percent of the medical costs of the plaintiff's bilateral knee replacement surgeries, [Liberty Mutual] disavows the validity of the argument that only Chubb as the insurer for the plaintiff's second injury is liable for the whole." Gill v. Brescome Barton, Inc., 142 Conn. App. 298.

Similarly, the CRB noted that at oral argument, counsel for Liberty Mutual argued that applying the rationale of Hatt to the facts of this case would be "an equitable outcome." In response, the CRB opined, "In light of the agreement her client had previously ratified, we are unpersuaded by this argument." [CRB Opinion; A18.] It is axiomatic that "one who seeks to prove that he is entitled to the benefit of equity must first come before the court with clean hands." Santangelo v. Elite Beverage, Inc., 65 Conn. App. 618, 623 (2001), citing Cohen v.

Cohen, 182 Conn. 193, 201 (1980). At the trial level, Liberty Mutual had made an offer to reimburse thirty-seven percent of Chubb's base rate: however, they are now arguing that they are not responsible for any of the indemnity benefits. This not only undermines the validity of their argument but also calls the "cleanliness" of their hands into question.

As the plaintiff's injuries are solely concurrent, it is helpful to consider the hypothetical situation which would result if the plaintiff had decided to undergo the knee surgeries separately. The plaintiff would undergo surgery for Liberty Mutual's knee, which would be paid for one hundred percent by Liberty Mutual. The plaintiff would immediately sustain a period of post-surgical total disability. It is irrefutable that Liberty Mutual would be solely responsible for one hundred percent of the plaintiff's post-surgical indemnity benefits during his recovery. This begs the question, why should Liberty Mutual be relieved of its obligation of payment for post-surgical indemnity benefits just because the plaintiff has elected to undergo simultaneous surgeries? This is especially true in light of the financial and administrative benefit Liberty Mutual received by having Chubb administer the surgeries and split the surgical costs.

Liberty Mutual's position not only misapplies prior case law, but would unfairly punish Chubb for agreeing to allow the plaintiff to undergo simultaneous knee replacement surgeries. Chubb would be forced to bear the expense of a *separate* and *unrelated* injury that merely occurred first in time. Thus, if the Hatt rationale is applied here, it would result in an absurd and unworkable result under the Workers' Compensation Act.

i. There is no other applicable precedent that precludes an equitable division of the plaintiff's indemnity benefits.

Liberty Mutual has cited Pizzuto v. Commissioner of Mental Retardation, 283 Conn. 257 (2007) as precedent that clearly disavows apportionment of liability in other situations.

Specifically, Liberty Mutual states: "In Pizzuto, the subsequent carrier was responsible for paying not only its share of § 31-308a benefits, but also an earlier carriers." [See Appellant's Brief at p. 26.] Liberty Mutual then asserts that, ". . . it illustrates the Court's consistent approach to ensuring that second employers and their carriers bear the full brunt of an employee's injury." [See Appellant's Brief at p. 26.]

However, a reading of Pizzuto reveals that the plaintiff was employed by the State of Connecticut for both injuries, and, thus, there was no "second" carrier to pay General Statutes § 31-308a benefits. As there were not separate insurance carriers involved, the crux of the matter was "whether § 31-308a benefits may be awarded on the basis of a prior disability when that disability substantially contributes to a claimant's loss of earning capacity following a second disability. . . ." Id., 264. The Court ultimately held, "when a prior disability is a substantial cause of the loss of earning capacity that a claimant suffers after a second disability, the commissioner may consider both disability awards in determining entitlement to and duration of a § 31-308a award." Id., 280.

Pizzuto did not involve a question of *who* should pay § 31-308a benefits, but rather, *what* may be considered in determining entitlement and duration of the award. There, the Court stated the sole issue on appeal was whether § 31-308a benefits may be awarded on the basis of a previous disability if that disability is a substantial cause of a claimant's loss of earning capacity following a subsequent injury resulting in further disability. Id., 259. Additionally, Pizzuto is factually distinguishable from the present case as the plaintiff's prior disability was a *substantial cause* in the loss of her earning capacity following the second injury. Here, there is no such combination. Pizzuto is legally and factually distinguishable

from the present case and, thus, does not provide precedential or persuasive authority applicable to the facts herein.

B. The Appellate Court correctly applied General Statutes § 31-278 in this matter.

The Appellate Court properly refuted Liberty Mutual's contention that the CRB's decision was not supported by any law by citing to the Board's reliance on § 31-278. "It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board." (Internal quotation marks omitted.) Leonetti v. MacDermid, Inc., supra, 310 Conn., 205-206, citing Dechio v. Raymark Industries, Inc., 299 Conn. 376, 388-89 (2010). Section 31-278, titled "Powers and duties of Commissioners," provides in pertinent part, "[The Commissioner] shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed on him by the provisions of this chapter." With respect to issues of statutory construction, our Supreme Court has recently held:

> When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered . . . When a statute is not plain and unambiguous, we also look for interpretative guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter. . ."

(Internal quotations omitted.) Marandino v. Prometheus Pharmacy, supra, 294 Conn. 574-575, citing Considine v. Waterbury, 279 Conn. 830, 836-37 (2006).

Our Supreme Court has held that when interpreting Workers' Compensation statutes:

> The spirit and purpose of the act, which is remedial in nature and should be construed broadly to accomplish its humanitarian purpose. Szudora v. Fairfield, 214 Conn. 552, 557 (1990). [I]n construing workers' compensation law, we must resolve statutory ambiguities or lacunae in a manner that will further the remedial purpose of the act. . . [T]he purpose of the act itself are best served by allowing the remedial legislation a reasonable sphere of operation considering those purposes.

(Internal quotation marks omitted.) Leonetti v. MacDermid, Inc., supra, 310 Conn. 208. The purpose of the Act "is to provide a prompt, efficient, simple and inexpensive procedure for obtaining benefits related to employment." (Internal quotation marks omitted.) Pietraroia v. Northeast Utilities, 254 Conn. 60, 74 (2000).

> The design of the rules of practice is to both facilitate business and to advance justice; they will be interpreted liberally in any case where it shall be manifest that a strict adherence to them will work surprise or injustice. . . Rules are a means to justice and not an end in themselves.

Pietraroia, supra, citing In re Dodson, 214 Conn. 344, 363 (1990).

As a preliminary matter, it is notable that the Trial Commissioner, CRB and Appellate Court all found that the fact pattern contained in the underlying matter was *sui generis,* that there was no applicable case law and that the apportionment statutes do not address the "precise circumstances" herein. Gill v. Brescome Barton, Inc., supra, 142 Conn. App. 294. Thus, Liberty Mutual's argument that the Board did not cite any law to support its conclusion is circuitous. As there is no one case or statute that is directly "on point," "the Board concluded that the commissioner properly had exercised his powers pursuant to General Statutes 31-278 to resolve the dispute between the insurers equitably, and that his finding and award were consistent with the 2010 agreement." Gill, supra, 124 Conn. App. 286. The Appellate Court also reached the same well-reasoned conclusion after it undertook plenary review of this matter.

i. *The plain meaning of § 31-278 and its relationship with other statutory provisions of the Act fully support the Appellate Court's decision affirming the Commissioner and CRB.*

In determining the intent of the legislature with regard to a specific statutory provision as applied to the facts, the plain meaning of the provision must be analyzed. Here, the applicable statute is § 31-278, which in and of itself provides the commissioner with the powers to perform the duties imposed on him or her by Chapter 568, the Workers' Compensation Act. With regard to the plain meaning of § 31-278, our Supreme Court has stated, "A plain reading of this language suggests that the commissioner's subject matter jurisdiction is limited to adjudicating claims arising under the act, that is, claims by an injured employee seeking compensation from his employer for injuries arising out of and in the course of employment." Stickney v. Sunlight Construction, Inc., et al., 248 Conn. 754, 762 (1999). Here, the claim "arises under the Act" as it stems from the plaintiff's claim for compensation from his employer for his knee injuries, which arose out of and occurred in the course of his employment. The plaintiff required knee replacement surgeries and sought the assistance of the Commissioner to have both surgeries performed simultaneously. The plaintiff has been a party to this matter throughout the proceedings. Accordingly, the underlying matter is squarely in the province of the Trial Commissioner.

Furthermore, § 1-2z states that the relationship of the statute in question to other statutes should be considered in addition to the text of the statute in question. In the present case, other relevant statutes include § 31-307b and § 31-298. The Trial Commissioner found that the relapse rate pursuant to § 31-307b applied to either injury as the plaintiff had attained maximum medical improvement for both injuries, returned to work, and subsequently

required total knee replacement for both knees.[5] [Rev. F&A Conclusion E; A24.] He also found that the plaintiff's injuries were independent of each other and that the replacement of either knee would involve a period of temporary total disability. [Rev. F&A ¶ 7; A23-24.] Pursuant to § 31-307b, the relapse rate is calculated using seventy-five percent of the average weekly earnings as of the date of the original injury or at the time of the relapse, whichever is greater. As the plaintiff's average weekly earnings at the time of his relapse were greater than his wages at the time of either of his original injuries, the plaintiff's average weekly earnings at the time of the relapse would govern. As a result, the same rate would apply to both Liberty Mutual's and Chubb's injuries, as the plaintiff would "relapse" at precisely the same time due to the simultaneous knee replacement surgeries.

The Trial Commissioner's decision equitably resolved the dispute between the insurers regarding the division of indemnity benefits calculated pursuant to § 31-307b, which is in accordance with the Commissioner's powers granted under § 31-278. Furthermore, this equitable decision is encouraged under § 31-298 which provides Workers' Compensation Commissioners with the power to proceed, "so far as possible, in accordance with the rules of equity. . . in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter."

The Supreme Court of Errors summarized the interrelationship of § 31-278 and § 31-298 regarding the powers and duties of the Commissioner shortly after the enactment of the

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5 Liberty Mutual has not challenged the applicability of this rate or briefed this issue, and, thus, the relapse rate is not in dispute. In fact, the Appellate Court specifically noted, "On appeal, Liberty Mutual has not contested the Commissioner's finding and award as to the plaintiff's relapse rate." Gill v. Brescome Barton, Inc., supra, 142 Conn. App. 283 n.2. As a result, Liberty Mutual has waived any right to contest the Commissioner's determination of the applicability of the relapse rate during the plaintiff's post-surgical period. *See*, Electrical Contractors, Inc. et al. v. Department of Education, 303 Conn. 402 (2012).

Workers' Compensation Act., in Appeal of Hotel Bond Co., 89 Conn. 143 (1915). With respect to the purpose of the Act, the Court noted, "Its procedure contemplates a speedy investigation and hearing by the commissioner without the formalities of a court . . . ." Id. The Court analyzed the duties of the Commissioner as follows:

> Some of the duties devolving upon the commissioner are quasi judicial, and some are wholly executive or administrative. He determines facts upon the classes of evidence allowed, and applies the law to the facts found, and renders judgment which affects the property rights of litigants before him, and may be enforced by execution issued as a course out of the superior court. He may hear the applicant at his residence. He proceeds to hearing without pleadings and without regard to the ordinary rules of evidence. He may make inquiry through oral or written and printed records best calculated to ascertain the substantial rights of the parties. He receives, files, and transmits all notices required by the act. He supervises agreements made between the employer and his workmen. He is the adviser of all and the umpire between the disputants.

(Emphasis added.) Id.

Here, the Trial Commissioner found that having simultaneous bilateral knee surgeries benefited the plaintiff and the insurers as the plaintiff only incurred one period of recovery, and, as a result, the insurers should equally share the cost of post-surgical indemnity. [Rev. F&A Conclusions F&G; A24.] The Board and the Appellate Court agreed that the remedial purposes of the Act were fostered by the plaintiff undergoing bilateral knee replacement surgery with one period of recovery. The Appellate Court noted that, "[T]he act is to provide for relatively quick and certain compensation." Gill v. Brescome Barton Inc., supra, 142 Conn. App. 299. Furthermore, the Trial Commissioner, CRB and the Appellate Court all found that the alternative, requiring the "plaintiff to undergo two surgeries at different times, would constitute an absurd result under the act." The Appellate Court further noted that

statutes cannot be construed to yield an absurd result. Gill v. Brescome Barton Inc., supra, 142 Conn. App. 295.

The position of Liberty Mutual is in direct contravention to the purpose of the Act and is inherently inappropriate, as it would militate against judicial economy. The Appellate Court and the CRB correctly upheld the decision of the Trial Commissioner, which was founded in common sense, fairness and equity. The Commissioner's decision was rendered in a manner best calculated to ascertain the substantial rights of the parties as the plaintiff and both insurers received a benefit from the plaintiff's simultaneous knee surgeries. Furthermore, the Commissioner's decision was in accordance with the remedial purpose of the Act as it provided the plaintiff with a "prompt, efficient, simple and inexpensive procedure for obtaining benefits related to employment." Pietraroia v. Northeast Utilities, supra, 254 Conn. 74. Accordingly, a liberal interpretation of § 31-278 is warranted in this matter as any other result would result in surprise or injustice and an absurd and unworkable result.

ii. The legislative history of General Statutes § 31-278 fully supports the conclusion of the Appellate Court in affirming the decisions of the Commissioner and the CRB.

Assuming *arguendo* that § 31-278 is not plain and unambiguous, General Statutes § 1-2z allows the court to seek interpretative guidance in the legislative history. "Over the course of the last 100 years, this court frequently has interpreted the provisions of our workers' compensation statutory scheme by looking at the purpose and the legislative history of the Act." Marandino v. Prometheus Pharmacy, supra, 294 Conn. 577. The legislative history of § 31-278 clearly supports the Commissioner's decision in the underlying matter.

From the inception of the Workers' Compensation Act in 1913, the Commissioner has been vested with the power to be the arbitrator of workers' compensation matters. The

following are excerpts from testimony surrounding the enactment of the Workers' Compensation Act in 1913, which underscore the role of the Commissioner:

> Under the old system that we have now, the expense of litigation is so great and the expense of hiring counsel is so great, that the manufacturer would rather pay him five hundred dollars and get rid of him. Under the present system, if you are not satisfied with what is just, go to the commissioner and we will see what he has to say, and the same process goes on. We have aimed to make that process so simple that you have got rid of all pleading except the original notice. We have got rid of all technicalities, all delays, all technical objections, and everything else. We have got a simple, efficient system of that sort and it is all under the jurisdiction of the courts so that in case of emergency, if the commissioner did not do what is right, the parties can go to the judge of the court directly and make complaint and get it sent back and revised.

Joint Hearing Before the Labor and Judiciary Committee on the Workmen's Compensation Bills. February 18, 1913 Legis. Reg. Sess. (Argument by Talcott H. Russell, Esq.), p. 44-45.

> We think that this is the right, proper and most efficient system; it is inexpensive, it is efficient, it is a great deal better than having three men, one of one party and one of another, seated here in Hartford or any other part, three men seated up there to decide upon these questions. These commissioners, by the way, are appointed territorialy [sic] . . .They are to be made up so that every territory, or rather, so that they shall be located so as to be most accessible to the parties concerned, so they won't have any long or expensive travel, or anything of that sort.

Joint Hearing Before the Labor and Judiciary Committee on the Workmen's Compensation Bills. February 18, 1913 Legis. Reg. Sess. (Argument by Talcott H. Russell, Esq.), p. 45.

The Commissioners' power has remained substantively unchanged by the legislature since that time. While the legislature has amended § 31-278 by Public Act, many of these amendments have pertained to increasing the number of Commissioners to maximize efficiency. See, e.g., PA 491, 1961 (established sixth district office); PA 577, 1965 (established seventh district office); PA 84-20, 1984 (established eighth district office). The legislative history of § 31-278 makes it clear that the Commissioners were granted power to fairly resolve disputes, such as this, in the interest of judicial economy.

iii. *The Appellate Court properly reviewed and purposefully affirmed the CRB's application of § 31-278 in this matter.*

Section § 31-278 properly was reviewed in the adjudication of the issues between Liberty Mutual and Chubb. Liberty Mutual's argument that the Appellate Court relied on § 31-278 in a different context than did the CRB is erroneous and unsupported by the respective opinions. Liberty Mutual contends that the CRB's reliance on § 31-278 pertained to the Commissioner's enforcement power and the Appellate Court applied it to the remedial purpose of the Workers' Compensation Act. Liberty Mutual's argument is problematic as: (1) both the CRB and the Appellate Court's decisions cite § 31-278 for the same proposition, (2) there is no evidence in the CRB's opinion to suggest that it solely relied on § 31-278 for the commissioner's enforcement powers and (3) the Appellate Court explicitly found that enforcement of the agreement was not the issue before the Trial Commissioner. Furthermore, Liberty Mutual's position narrowly construes § 31-278, rather than allowing it a broad sphere of operation as required by the Act.

The CRB's and the Appellate Court's decisions are clear that their citation to § 31-278 supports the contention that the Commissioner has the power to decide equitably the division of the plaintiff's post-surgical indemnity benefits. The CRB's opinion is devoid of any evidence to suggest that their reference to § 31-278 was in connection with the Commissioner's enforcement powers. In fact, the CRB's opinion only references § 31-278 one time. That sentence states in its entirety, "We believe that the trial commissioner properly exercised his powers pursuant to § 31-278 C.G.S. to equitably resolve the dispute between the insurance carriers in this instance." [CRB Opinion; A13.]

It just cannot be said that the CRB's reliance on this statute focused on enforcement of the 2010 Agreement. Rather, a reading of its decision shows that they considered prior

case law and found it inapplicable. Thus, it was forced to reach an equitable decision in accordance with the Act rather than an "absurd and unworkable result." Similarly, the Appellate Court held that enforcement of the 2010 Agreement was not an issue at trial. The Appellate Court stated:

> Enforcement of the agreement was not the issue decided by the commissioner. Rather, the commissioner decided how to apportion the indemnity paid to the plaintiff during his temporary total disability following bilateral knee replacement surgery. The commissioner therefore did not enforce the 2010 agreement, which it found did not address the rate of the plaintiff's indemnity or the contribution from each of the insurers.

(Emphasis added.) Gill v. Brescome Barton Inc., supra, 142 Conn. App. 297.

The Appellate Court properly reviewed and purposefully affirmed the Board's decision. The Appellate Court did not fail to recognize that the CRB relied upon § 31-278 as an enforcement power because the CRB did not rely upon § 31-278 as an enforcement power. Rather, the Appellate Court held that § 31-278 granted the Commissioner all powers necessary to perform duties under the Act and here, that purpose is to compensate the worker for injuries arising out of and in the course of employment. Id., 298.

C. The Appellate Court correctly held that any error, *if any*, made by the CRB was harmless.

The Appellate Court correctly concluded that the Commissioner's findings were sufficient to support his award and as a result, any facts found by the CRB, *if any*, were gratuitous and not necessary to the resolution of the legal issue before it. The crux of Liberty Mutual's arguments on appeal are premised upon their assertion that the CRB *sua sponte* interpreted the 2010 Agreement to include indemnity benefits and found that the Commissioner used his authority pursuant to § 31-278 to enforce the Agreement. Liberty Mutual has also alleged that the Appellate Court failed to recognize this error. However, this is simply not true as: (1)

the CRB understood that the 2010 Agreement pertained solely to medical and surgical costs and (2) the Commissioner did not enforce an agreement pursuant to General Statutes § 31-303. Accordingly, the Appellate Court appropriately upheld the CRB's decision affirming the decision of the Trial Commissioner.

As a threshold matter it must be noted that here, the Appellate Court did not decide that the Board violated the standard of review by finding facts with respect to the 2010 Agreement. Gill v. Brescome Barton Inc., supra, 142 Conn. App. 293, n.10. Rather, the Court assumed that a violation had occurred, without actually deciding that issue. As a result, the Court engaged in an analysis to discern whether the Board's decision was supported by the record thereby rendering any error, if any, harmless.

It is well settled that error is considered harmless if the record reveals sufficient independent evidence to support the decision. Testone v. C.R. Gibson Co., 114 Conn. App. 210, 219 (2009). The court may rely on any ground supported by the record to affirm judgment. State v. Burney, 288 Conn. 548, 560 (2008). "The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) Desrosiers v. Henne, 283 Conn. 361, 366 (2007). In Wiseman v. Armstrong, 295 Conn. 94, 108 (2010), the Court examined the current standard and noted, "[t]he doctrine of harmless error is a very elastic one. It has been adopted by courts to avoid ordering new trials because of judicial errors that would not have a substantial impact on the truth finding process and result in an injustice." (Internal quotation marks omitted.) The Court further stated, "These principles embody the concept of judicial economy. By requiring parties to show harm resulting from error, courts avoid the cost, delay and burden of a new trial when the error failed to affect the underlying fairness of the trial proceeding." Id. In an effort to

emphasize the importance of the harmless error standard on judicial economy, the Court examined the case law prior to the use of this standard. The Court noted that prior to harmless error reform, cases were often tried more than once which resulted in a backlog. Additionally, attorneys were aware that any error would result in a new trial and would place the error on the record to "hedge against the losing verdict." Id., p. 107.

Here, the Appellate Court held that, "[t]he findings of the commissioner are sufficient to support his award, which is grounded in the remedial purpose of the act." Gill v. Brescome Barton, Inc., supra, 142 Conn. App. 292. The Appellate Court, like the CRB, based its decision on a variety of factors including the lack of statutory guidance, the lack of applicable precedent case law, the facts found by the Commissioner as well as those contained in the evidentiary record in an effort to reach an outcome consistent with the purpose of the Workers' Compensation Act. Specifically, the Appellate Court agreed with the reasoning of the CRB and the Commissioner "that the remedial purposes of the act are fostered by the plaintiff's undergoing bilateral knee replacement surgery with one period of recovery. The act is to provide for relatively quick and certain compensation." (Internal citations and quotation marks omitted.) Id., 299. Furthermore, the Court stated that, "Liberty Mutual acknowledges it is responsible for the plaintiff's first injury and that it would be liable for all costs if the plaintiff had knee replacement surgery for the first injury at a time other than when the second injury knee replacement surgery took place." Id., 299-300. Similarly, the CRB found, "Had the claimant never sustained the more recent injury on his right knee, Liberty Mutual would have been obligated to pay the entire amount due for temporary total disability attributed to the original left knee injury." [CRB Opinion; A16.]

As it is undisputed that the plaintiff would be temporarily totally disabled as a result of either surgery, the Appellate Court and the CRB properly considered the only alternatives for the payment of the plaintiff's post-surgical indemnity benefits: (1) allowing the plaintiff to undergo simultaneous surgeries and have both insurers each pay the plaintiff one-hundred percent of his post-surgical indemnity benefits, or (2) requiring the plaintiff to undergo separate knee surgeries.

With respect to the former, it is clear that our jurisprudence prohibits an injured employee from receiving a double recovery as it is void against public policy. Here, the Board noted the long appellate precedent against double recoveries. [CRB Opinion; A18.] In Nichols v. The Lighthouse Restaurant, Inc., 246 Conn. 156, 167 (1998), the court addressed the issue of an employer's statutory right to subrogation of the proceeds that an injured employee receives from a third party tortfeasor and held that the defendant's argument was "contrary to the public policy against double recovery by an employee under our workers' compensation statutes." See also, Pokorny v. Getta's Garage, 219 Conn. 439, 453-54 (1991), "all workers' compensation legislation, because of its remedial nature, should be broadly construed in favor of disabled employees and . . . that our Workers' Compensation Act prohibits double recovery." (Internal quotation marks omitted.) In Enquist v. General Datacom, 218 Conn. 19, 26 n.6 (1991), the court referenced Larson, Workmen's Compensation Law in quoting that "[t]he policy of avoiding a double recovery is a strong one, and has on occasion been invoked to override a result that might be thought required by a literal or technical interpretation of statutes . . . ." (Internal quotation marks omitted.)

Our case law frowns on double recoveries in the Workers' Compensation forum. See, e.g. McGowan v. General Dynamics Corporation/Electric Board Division; 210 Conn. 580

(1989), (disability benefits paid under state's Workers' Compensation Act are entitled to credit of disability benefits paid under Longshore and Harbor Workers' Compensation Act); Pasquariello v. Stop and Shop Companies, Inc., 281 Conn. 656 (2007), (temporary total disability benefits paid under the Workers' Compensation Act are offset by the amount of Social Security retirement benefits); Paternostro v. Edward Coon Co., 217 Conn. 42 (1991), (rule against double compensation prohibited concurrent payment of specific indemnity benefits and temporary partial incapacity benefits for injuries).

In the alternative, the Appellate Court and the CRB also considered the Trial Commissioner's Finding that it would be irrational to force the claimant to undergo separate knee surgeries and incur a longer period of disability. Here, the Appellate Court held:

> [T]he commissioner analyzed the plaintiff's injuries as being independent of one another, concluded that the replacement of either knee would involve a period of temporary total disability, determined that having simultaneous bilateral knee surgery benefited the plaintiff as well as the insurers in that the plaintiff incurred only one period of recovery and decided it made sense for the insurers to share equally the cost of indemnity. The board concluded that the commissioner's award falls within the remedial purpose of the act. *To require the plaintiff to undergo two surgeries at different times would constitute an absurd result under the act.*

(Emphasis added.) Gill v. Brescome Barton, Inc., supra, 142 Conn. App. 295

The position set forth by Liberty Mutual would allow the plaintiff to have one total knee replacement surgery performed which would be followed by a period of temporary total disability. During this time, the plaintiff would be receiving weekly indemnity benefit checks. At whatever point in time the plaintiff was able to return to gainful employment, he could then choose to undergo the total knee replacement surgery on the other knee. This surgery would again be followed by another period of temporary total disability. In such a scenario, the

plaintiff could remain out of work for an extended period of time, continuing to receive disability payments.

The plaintiff's decision to have both knee replacement surgeries performed at the same time undoubtedly benefited all parties involved. The plaintiff shortened not only his period of disability, but also his recovery. Liberty Mutual and Chubb benefited as the plaintiff's decision allowed them to split the surgical and post-surgical costs which would have duplicated had the plaintiff chosen to undergo separate surgeries. Thus, the plaintiff's decision saved both Liberty Mutual and Chubb half of the surgical and post-surgical costs. Liberty Mutual also reaped the benefit of saving on the administrative costs of the surgery as Chubb absorbed them as well. The Appellate Court recognized this benefit and stated:

> Moreover, the plaintiff's decision to have both knees replaced at the same time benefits him in that he will only have one period of recovery and also benefits both insurers in that they are able to divide many of the surgical and postsurgical costs that would have been duplicative had the plaintiff opted to have his knees replaced at separate times.

Gill v. Brescome Barton, Inc., supra, 142 Conn. App. 284.

The record is replete with sufficient independent evidence to support the Appellate Court's conclusion that any error on behalf of the CRB, if any, was harmless. The decision of the plaintiff in undergoing simultaneous knee surgeries was in furtherance of the goals of the Workers' Compensation Act as it allowed him to return to work much quicker than if he had undergone separate surgeries.[6] The Trial Commissioner's decision with respect to the equitable division of post-surgical indemnity benefits also was consistent with the Workers' Compensation Act as it prevented the plaintiff from reaping a double recovery. Accordingly,

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6 One of the main purposes of the Workers' Compensation Act is "to encourage the employee to return to work as soon as possible following a compensable injury." Kovalike v. E. Stiewing, Inc., 4905 CRB-7-04-12 (February 28, 2006).

the findings of the Trial Commissioner were sufficient to support his Award which was based on the remedial purpose of the Workers' Compensation Act. Any error on behalf of the CRB in reviewing this decision was harmless as any facts found by the Board were gratuitous and unnecessary to the resolution of the legal issue before it.

i. *The CRB did not exceed its power on review by substituting its judgment for that of the Trial Commissioner by interpreting the 2010 Agreement.*

Liberty Mutual has asserted incorrectly that the CRB's interpretation of the 2010 Agreement is the sole basis of its decision and as a result, substituted its judgment for that of the Trial Commissioner. In support of its position, Liberty Mutual has argued that the CRB *sua sponte* interpreted the 2010 Agreement to include indemnity benefits. The record is clear that the CRB, like the Trial Commissioner, understood that the 2010 Agreement pertained to medical and surgical expenses.

In reviewing the decision of the Trial Commissioner, the CRB did not base its opinion solely on the 2010 Agreement, but rather formulated its decision on a multitude of factors. Specifically, the Board considered the lack of statutory guidance, lack of applicable precedent case law, the facts found by the Commissioner as well as those contained in the evidentiary record in an effort to reach an outcome consistent with the purpose of the Workers' Compensation Act. The CRB adopted the Trial Commissioner's findings and concluded that:

> The dispute herein is one of apparent first impression and requires this tribunal to look at the expressed intent of the parties and requires this and the statutory approach to compensating total disability injuries in the absence of multiple liability parties. As we noted in Goulbourne v. State/Department of Correction, 5192 CRB-1-07-1 (January 18, 2008), there are lacuna present in Chapter 568 and when they present themselves it is our obligation to reach a reasoned outcome consistent with the totality of the Workers' Compensation Act.

[CRB Opinion; A17-18.]

In an effort to reach a reasoned outcome consistent with the Workers' Compensation Act, the Board looked to the 2010 Agreement of which the Trial Commissioner had taken administrative notice and cited in his Finding and Award. [Rev. F&A ¶ 5; A23.] As a result, this Agreement was part of the evidentiary record in this matter and was available for the Trial Commissioner and the CRB's review.

The CRB's Opinion is replete with references that it understood the precise terms of the 2010 Agreement. In fact, the Board stated:

> The trial commissioner took administrative notice of an agreement dated March 10, 2010, in which the parties agreed that the carrier on the risk for the second injury would authorize and administer bi-lateral knee replacement surgery and that the carrier on the risk for the first injury would reimburse 50 percent of the surgical costs, incidental expenses, and prescriptions related to the surgery not to exceed the workers' compensation fee schedule. This agreement did not address what rate the claimant would be paid indemnity benefits or address the contribution of each carrier towards indemnity resulting from the surgery.

(Emphasis added.) [CRB Opinion; A14.]

This is also evidenced by the Board's holding in this matter, "We believe that the trial commissioner properly exercised his powers pursuant to C.G.S. § 31-278 to equitably resolve the dispute between the insurance carriers in this instance. The June 7, 2011 Finding and Award is *consistent* with the agreement reached between the carriers on *other* issues to resolve this dispute." (Emphasis added.) [CRB Opinion; A13.] The Board later stated, "As we find the Finding and Award *consistent* with the contractual agreements between the appellant and appellee; as well as the public policy enunciated in Chapter 568, we affirm the trial commissioner's decision." (Emphasis added.) [CRB Opinion; A19.]

The Board could not have been any clearer that it understood that the Agreement did not encompass the post-surgical indemnity benefits. Thus, it would be impossible for the CRB's decision to solely be based on its alleged *"sua sponte"* interpretation. By virtue of the

2010 Agreement, Liberty Mutual agreed to half of the medical benefits and in doing so, tacitly agreed that it is responsible for the left knee. Therefore, the CRB held that it stands to reason that Liberty Mutual should also pay half of the post-surgical indemnity benefits resulting from surgery on that knee.

ii. *The CRB did not enforce an agreement pursuant to General Statutes 31-303.*

"Enforcement" of an agreement pursuant to General Statutes § 31-303 never was an issue for the Formal Hearing as: (1) the 2010 Agreement was never enforced and (2) to the extent the 2010 Agreement was construed at the Formal Hearing, Liberty Mutual was aware. Thus, Liberty Mutual's argument that interpretation or enforcement of the 2010 Agreement pursuant to § 31-303 was not on the hearing notice, and therefore not an issue at the Formal Hearing, is erroneous and without merit.

Section 31-303 was not listed on the hearing notice because it was not germane to the issues before the Trial Commissioner. This statute was enacted to ensure that payments which were agreed to be made between parties are paid in a timely manner at the peril of penalties. In the present case, Chubb has continued to make payments on a without prejudice basis to the plaintiff. The facts and circumstances of this case would in no way implicate § 31-303.

Furthermore, there is no evidence to suggest that enforcement of the 2010 Agreement was an issue at trial or on review by the CRB and Appellate Court. The transcript of the Formal Hearing is devoid of any evidence to suggest that enforcement of the 2010 Agreement was an issue for the Trial Commissioner. In fact, at the outset of the hearing, the Commissioner stated, "Okay. So the only issue I need to sort out is what if any amount Liberty will have to pay." [1/10/11 Formal Tx., p. 5; A29.] Similarly, there is not any evidence

in the CRB's opinion to suggest that enforcement of the 2010 Agreement was an issue. Indeed, the word "enforcement" was not uttered once in its opinion. This is corroborated by the Appellate Court's conclusion that enforcement of the 2010 Agreement was not the issue to be decided by the Commissioner and that the Commissioner did not enforce the 2010 Agreement. Gill v. Brescome Barton, Inc., supra, 142 Conn. App. 297.

Since the inception of this matter, the 2010 Agreement has been the cornerstone of this case and thus, it is inconceivable that Liberty Mutual was not prepared to address the Agreement. The 2010 Agreement was drafted during the course of a Formal Hearing held on March 10, 2010. Additionally, the statements of the parties at trial and the Commissioner's administrative notice of the 2010 Agreement clearly reflect that the 2010 Agreement was available for the Commissioner's consideration at the January 10, 2011 Formal Hearing and was part of the evidentiary record. [7] Incredibly, it was counsel for Liberty Mutual who *first* referenced the 2010 Agreement at the Formal Hearing. The Trial Commissioner and counsel for Chubb referenced the agreement in their statements with respect to the issues for the hearing. The 2010 Agreement also was referenced by the Trial Commissioner when he explained to the claimant that the medical portion of the case had been resolved and that he

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7 "[Commissioner]: And there is no dispute as to the medical necessity or the reasonableness of the surgeries, correct?"
"[Counsel for Liberty Mutual]: *Correct, Commissioner, I believe there is even an agreement in your file."*
"[Commissioner]: Right. And Mr. Gill is going to have that done when, sir?"
"[Plaintiff]: February 24th."
"[Commissioner]: And that will be administered by the last carrier, which is Chubb, Correct, Mr. Finn?"
"[Counsel for Chubb]: Yes, Commissioner, pursuant to an agreement entered into by the parties at an informal hearing with a writing on 3/10/2010. Chubb will administer the bilateral total knee replacements and seek reimbursement from the Liberty for 50 percent of all expenses related to the surgery and prescription meds."
(Emphasis added.) [1/10/11 Formal Tx., p. 4-5; A26-27.]

would determine what amount Liberty Mutual would have to reimburse Chubb. [1/10/11 Formal Tx., p. 6-7; A30-31). It is also notable that this was not a lengthy Formal Hearing with multiple facts and legal issues in dispute. This is evidenced by the length of the Formal Hearing transcript which consisted solely of seven pages. Accordingly, all parties were aware of the issues before the Commissioner and § 31-303 was *not* one of them.

VI. CONCLUSION AND STATEMENT OF RELIEF REQUESTED

It would be wholly inconsistent with the Workers' Compensation Act to overturn the decision of the Appellate Court. The Trial Commissioner was faced with a unique set of circumstances for which there was no applicable precedent. The decision rendered was entrenched in common sense, equity and fairness for *all* parties involved. In fact, the decision embodies the very purpose of the Workers' Compensation Commissioner, as the alternative finding requested by Liberty Mutual would have been contrary to the purposes of the Act and inherently inappropriate against the interest of judicial economy. Liberty Mutual agreed to 50 percent of the medical and surgical costs for two separate injuries sustained at two different points in time. This very fact renders its argument that Chubb should pay one hundred percent of the post surgical indemnity caused by the surgeries illogical and legally irreconcilable. As medically and logically, one cannot be *more than* totally disabled at a given time or "double totally disabled," the Commissioner "split the baby" and held each insurer responsible for their respective injuries. Any other result would have produced a double recovery or a violation of the humanitarian and remedial purpose of the Act. The Appellate Court and CRB recognized that this was the appropriate decision and affirmed the Trial Commissioner's Finding and Award.

For the reasons stated herein, Appellee, CHUBB AND SON, respectfully requests that this Court answer the certified question in the affirmative and affirm the decision of the Appellate Court.

RESPECTFILLY SUBMITTED,

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CERTIFICATION OF SERVICE

I hereby certify that the foregoing Supreme Court Defendant-Appellee Brief complies with the requirements of Practice Book § 67-2 and uses Arial 12 point type. I further certify that pursuant to Practice Book § 62-7, a copy of the foregoing Supreme Court Appellee Brief has been mailed, postage prepaid, this 17th day of March, 2014 to:

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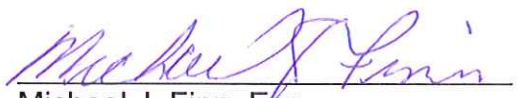

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